

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	)	
	)	Confirmation No.: <b>8060</b>
<b>Lawson, et al.</b>	)	
	)	
Serial No. <b>10/608,415</b>	)	Examiner: <b>Frantzy Poinvil</b>
	)	
Filed: <b>June 30, 2003</b>	)	Art Unit: <b>3692</b>
	)	
For: <b>A TECHNIQUE FOR INFORMATION FLOW</b>	)	
<b>TO PAYEES</b>	)	
	)	
Docket No.: <b>23952-0103</b>	)	
	)	
Customer No.: <b>72386</b>	)	

APPLICATION FOR PATENT TERM ADJUSTMENT  
UNDER 37 C.F.R. § 1.705(d)

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Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

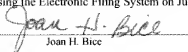
Applicants respectfully request reconsideration of the Patent Term Adjustment indicated with the Notice of Allowance ("NOA") mailed on June 29, 2009.

According to the NOA, the Patent Office has calculated that the Patent Term Adjustment under 35 U.S.C. § 154(b) shall be 1132 days, assuming that the patent issues on the Tuesday before the date that is 28 weeks from the mailing of the NOA – January 5, 2010. Applicants submit that this determination is incorrect. Assuming January 5, 2010 as the issue date, the correct Patent Term Adjustment is **1916 days**, as explained below.

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CERTIFICATE OF ELECTRONIC TRANSMISSION

I hereby certify that this correspondence is being filed with the United States Patent and Trademark Office, in electronic format, using the Electronic Filing System on July 22, 2009.

  
Joan H. Rice

**A. USPTO's Calculation:** The Patent Term Adjustment History available on the Patent Application Information Retrieval System (PAIR) shows, in pertinent part, an USPTO delay in the amount of 1132 days, which consists of:

(period A) 1103 days of USPTO delay calculated from fourteen months after the application filing date on June 30, 2003, to the date the first Office Action was mailed on September 7, 2007;

(period B) 67 days of USPTO delay calculated from four months after the Applicants' first Amendment and Response filed on December 7, 2007, to the date the USPTO mailed the non-final Office Action on June 13, 2008;

(period C) 31 days of Applicant delay calculated from three months after the USPTO mailed the non-final Office Action on June 13, 2008, to the date the Applicants filed the second Amendment and Response on October 14, 2008;

(period D) 6 days of Applicant delay calculated from the date the Applicants filed the second Amendment and Response on October 14, 2008, to the date the Applicants filed an Information Disclosure Statement on October 20, 2008; and

(period E) 1 day of Applicant delay calculated from the date the Applicants filed the second Amendment and Response on October 14, 2008, to the date the Applicants filed an Information Disclosure Statement on October 20, 2008.

**B. Applicants' Re-Calculation:** Applicants do not refute the USPTO's calculations regarding the delay periods outlined above (periods A-E). However, Applicants submit that the USPTO delay should also include delay calculated from 3 years from the application filing date

on September 21, 2004, to the anticipated issue date of January 5, 2010 (“3-year pendency delay”) that does not overlap with any of the USPTO’s delay indicated in the NOA and as period A and period B delays. Applicants have calculated this 3-year pendency delay as 784 days USPTO delay (i.e., 1285 days between June 30, 2006 and January 5, 2010 – 434 days of overlap of between June 30, 2006 and September 7, 2007 – 67 days of overlap between December 7, 2007 to and June 13, 2008 = 784 days). This period of 784 days shall be added to the originally calculated period of 1132 days USPTO delay, resulting in a total Patent Term Adjustment of 1916 days.

Under 35 U.S.C. § 154(b)(1)(B), USPTO delay occurs if the issue of an original patent is delayed due to the failure of the Patent Office to issue a patent within 3 years after the actual filing date of the application in the United States (i.e., “B delay”). In its calculation, however, the USPTO failed to consider any 3-year pendency delays prescribed by Section 154(b)(1)(B), depriving Applicants of additional patent term rightfully owed.

When re-calculating this delay, Section 154(b)(2)(A) requires accounting for and not double-counting any overlapping periods - “[t]o the extent that periods of delay attributable to [USPTO delays] *overlap*, the period of any adjustment granted . . . shall not exceed the actual number of days the issuance of the patent was delayed.” 35 U.S.C. § 154(b)(2)(A). The recent district court case of *Wyeth v. Dudas* interpreted this section to clarify that “overlap” as used by the statute means only those days that actually overlap on a calendar. See *Wyeth v. Dudas*, 2008 U.S. Dist. LEXIS 76063, 88 U.S.P.Q.2D (BNA) 1538 (D.C.C. 2008) (“Periods of delay that fit under [35 U.S.C. § 154(b)(1)(A)] are called ‘A delays’ . . . . The period that begins after the three-year window has closed is referred to as the ‘B delay’ . . . . If an ‘A delay’ occurs on one

calendar day and a 'B delay occurs on another, they do not overlap and § 154(b)(2)(A) does not limit the extension to one day."'). Accordingly, as indicated in the calculation above, Applicants have properly accounted for the overlap between the additional 3-year pendency owed and the above periods A and B – 434 days and 67 days of overlap. Therefore, the omission of 784 days from the patent term adjustment was made in error and Applicants respectfully request it be added back to the patent term adjustment.

**C. Uncertain Issue Date:** These calculations are made according to a presumed issue date of January 5, 2010, as indicated in the NOA. If, however, the issue date is different, the 3-year pendency calculation will be different. Applicants, therefore, respectfully request that when considering this Application for Patent Term Adjustment the USPTO calculate the 3-year pendency delays beginning from June 30, 2006 and ending on the actual issue date of the patent, accounting for any differences between the presumed issue date and the actual issue date.

**D. Additional Applicant Delay Caused by Amendment Under 37 C.F.R. § 1.312:** In addition to the Applicant delays identified in Section A above, the calculation of the Patent Term Adjustment shall also be reduced by any additional time caused if an Amendment Under 37 C.F.R. § 1.312 ("312 Amendment") is filed, as prescribed by 37 C.F.R. § 1.704(b)(1), which is indiscernible at this time. This additional Applicant delay shall be calculated as the lesser of: the number of days from when a 312 Amendment is filed to the mailing date of the corresponding response by the USPTO, or four months. Accordingly, any delay caused by the filing of a 312 Amendment may result in a four month reduction in the recalculation of the Patent Term Adjustment, at the most.

Application No.: 10/608,415  
Filed: June 30, 2003  
APPLICATION FOR PATENT TERM  
ADJUSTMENT UNDER 37 C.F.R. § 1.705(d)

### CONCLUSION

Applicants hereby notify the Office of this apparent error in the Patent Term Adjustment indicated in NOA mailed on June 29, 2009 for the above-referenced application, and respectfully request indication of a corrected Patent Term Adjustment on the resulting patent. The Commissioner is hereby authorized to charge the fee of \$200.00 required under 37 C.F.R. § 1.18(e) to Deposit Account 19-2059. The foregoing is believed to be a full and complete Application for Patent Term Adjustment under 37 C.F.R. § 1.705.

Respectfully submitted,



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Brian J. Decker  
Reg. No. 61,258

Date: July 22, 2009

SUTHERLAND ASBILL & BRENNAN LLP  
999 Peachtree Street, NE  
Atlanta, Georgia 30309-3996  
Telephone: (404) 853-8130  
Facsimile: (404) 853-8806

Attorney Docket No.: **23952-0103**